

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ERODNEY PERRY)	
Claimant)	
)	
VS.)	Docket Nos. 1,040,692;
)	1,040,693; & 1,046,206
PENTAIR PUMP GROUP, INC.)	
Respondent ¹)	
)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the February 15, 2010, Award entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on June 2, 2010. Mike R. Wallace, of Shawnee Mission, Kansas, appeared for claimant. Mark E. Kolich, of Lenexa, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) denied claimant an award of compensation in Docket No. 1,040,692.² In Docket No. 1,040,693, the ALJ ordered respondent to pay all authorized medical expenses related to treatment of claimant's injuries but did not find claimant had any permanent partial impairment as a result of the injury in that docketed case. In Docket No. 1,046,206, the ALJ ordered respondent to pay all authorized medical expenses related to treatment of claimant's injuries and awarded claimant a 10 percent permanent partial impairment to his whole body, reduced by 0.83 weeks for overpayment of temporary total disability benefits.

¹ The ALJ's Award as well as both claimant's and respondent's briefs to the Board show respondent to be self-insured. But the Division records show respondent was insured by Liberty Insurance Corp. from January 1, 2007 to January 1, 2008, and by New Hampshire Insurance Company from January 1, 2008, to January 1, 2010.

² Respondent admitted the compensability of this claim, and claimant was provided authorized medical treatment. Therefore, the Board considers the ALJ's denial of this claim to go only to the issue of the nature and extent of claimant's disability, that is, whether claimant is entitled to an award of permanent partial disability compensation.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant asserts he proved that he suffered a 5 percent permanent partial impairment to the body as a whole in Docket No. 1,040,692 for his low back injury. He further contends he proved he suffered a 10 percent permanent partial impairment to the body as a whole in Docket No. 1,040,693, for his right hip injury. Last, claimant argues that he sustained his burden of proof that the 10 percent permanent partial impairment to the body as a whole for his back injury should have been apportioned between the October 8, 2007, and April 28, 2009, accidents.

Respondent contends that the ALJ was correct in finding that it was speculative that claimant suffered permanent impairment from his accident of October 8, 2007, (Docket No. 1,040,692). As for claimant's alleged hip injury on March 13, 2008, respondent argues that the testimony of Dr. Edward Prostic is insufficient to support an award of compensation in Docket No. 1,040,693. Respondent contends the only compelling evidence is Dr. Alexander Bailey's testimony that claimant has a 5 percent permanent partial impairment, which he did not apportion between the three accidents. Accordingly, respondent asks the Board to modify the ALJ's Award to the extent that claimant should be compensated for a 5 percent whole body impairment as a result of the April 28, 2009, injury. Respondent requests that the Board affirm the Award in all other respects.

The issue for the Board's review is: What is the nature and extent of claimant's disability in each of the above three docketed cases?

FINDINGS OF FACT

Claimant has been employed by respondent for approximately eight years. He has filed three workers compensation claims for injuries occurring on October 8, 2007; March 13, 2008; and April 28, 2009.

On October 8, 2007, claimant had been sent to tear down a rotating assembly. While he was prying it with a pry bar, the sleeve broke free and he fell onto his back, injuring his low back and tail bone. He was sent to Dr. Kimberly Cater with Occupational Health Services, was put on light duty for about three weeks, and was prescribed muscle relaxers. After about four weeks, he was sent to physical therapy. Eventually, claimant was returned to full duty, although he testified he was still having some problems.

On March 13, 2008, claimant was lifting an impeller onto a press. When he turned to set it up, he felt pain in his lower right back, in his right hip, and down his right leg. He

notified his employer of his injury. Respondent again sent him to Dr. Cater. Claimant later asked respondent if he could go to a doctor on his own, and he was allowed to see Dr. John Breth at the Kansas University Medical Center. Claimant testified that Dr. Breth took x-rays and told him he had a small tear in the labrum of his right hip. Dr. Breth gave claimant shots in that area. Respondent decided to send claimant to another physician, and he was sent to Dr. John Ciccarelli. Dr. Ciccarelli took some x-rays and provided claimant with shots in his low back. Ultimately, claimant was referred to Dr. Zarr, who sent him to work hardening for five weeks. During this time period, claimant was working at light duty. Claimant eventually was demoted to a janitor position, which the parties agreed reduced his average weekly wage to \$530.18.

On April 28, 2009, while working as a janitor, claimant stepped into some water, slipped and fell onto his back on his right side. He was taken by ambulance to the hospital. He was referred by respondent to Dr. William Raue at Occupational Therapy, who ordered an MRI and told claimant that he had a pinched nerve. Claimant was then referred to Dr. Alexander Bailey. Dr. Bailey performed several tests on claimant's right hip and low back. Claimant was released from treatment on August 24, 2009. Claimant has returned to his normal job duties and is working without restrictions earning a higher wage than what he was making before his injury of April 28, 2009, and comparable to what he was earning before his temporary demotion to the janitor position.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant on July 18, 2008, and October 5, 2009, both times at the request of claimant's attorney. On July 18, 2008, claimant described to Dr. Prostic the two injuries he sustained, the first being on October 8, 2007, and the second on March 13, 2008. Claimant told Dr. Prostic he had pain from his low back to his posterior right knee. He said he had difficulty initiating walking when he woke up in the morning. He experienced worsening of his symptoms with progressive standing, walking, going up or down stairs, squatting or kneeling. He had paresthesias in his posterior thigh. At times, he felt as if his hip was going to give way.

In Dr. Prostic's examination of the lumbar spine, he found that claimant had tenderness at the right greater trochanter. His posture, spinal alignment, and range of motion were satisfactory. Claimant had difficulty walking on his right forefoot but was able to squat completely. Leg lengths were symmetrical, and no atrophy was noted in either leg. Straight leg raise was negative. No neurologic deficit was noted in either leg. X-rays of the lumbar spine showed no significant abnormality. In Dr. Prostic's examination of claimant's right hip, he found claimant's alignment was satisfactory. There was no heat, swelling, erythema, or atrophy noted. There was tenderness at the greater trochanter. There was significant pain by the combination maneuver of hip flexion and internal rotation. No other abnormality was obvious. Dr. Prostic reviewed claimant's MRI with contrast of the right hip that had been done on July 7, 2008, and said the results were suggestive of tearing of the anterior acetabular labrum.

As a result of Dr. Prostic's review of claimant's history, complaints, and physical examination, he opined that on or about October 8, 2007, claimant sustained an injury to his low back with sprain or strain, and that on March 13, 2008, claimant sustained injury to his right hip with femoroacetabular impingement syndrome.

Claimant returned to see Dr. Prostic on October 5, 2009. He told Dr. Prostic that he had suffered a new injury at work on April 28, 2009, when he slipped and fell, reinjuring his back. Dr. Prostic reviewed claimant's medical records. He found an MRI of the lumbar spine done May 5, 2009, showed bulging annuli with neuroforaminal encroachment, greatest on the right at L5-S1. An MRI of claimant's right hip ordered by Dr. Bailey on May 28, 2009, done without contrast, was within normal limits. An EMG done June 1, 2009, showed some slight irritability of the right S1 paraspinous muscles. A diskography was performed on August 17, 2009.

Claimant complained of significant pain in his low back with radiation down his right leg to the posterior calf. He had difficulty pushing off with his right leg. In Dr. Prostic's examination, he found claimant's posture while sitting, standing and walking was satisfactory. His spine had normal alignment. Claimant had mild tenderness of the lower lumbar segments. Range of motion for forward flexion was 45 degrees; extension was 15 degrees; lateral bend was 15 degrees to the right and 25 degrees to the left; and lateral rotation was complete to each side. Trendelenburg sign was negative. Claimant was able to walk on his toes and heels. He was able to squat to two-thirds of normal. He had no calf atrophy, and straight leg raise was negative bilaterally. No neurologic deficit was obvious. X-rays of the pelvis with a lateral view of the right hip showed no obvious abnormality.

Dr. Prostic opined that as the result of the April 28, 2009, accident, claimant aggravated his preexisting low back condition and developed a mild radiculopathy. His opinion concerning claimant's previous injuries was unchanged from his July 18, 2008, examination. Dr. Prostic said that claimant needs conservative care for his low back. For claimant's hip, Dr. Prostic said in the future claimant could need either arthroscopy or perhaps dislocation of his hip and repair or excision of the labrum.

Based on the *AMA Guides*,³ Dr. Prostic rated claimant as being in DRE Lumbosacral Category II, for a 5 percent permanent partial impairment to his low back for sprain and strain as a result of the October 8, 2007, accident.

As a result of claimant's second accident of March 13, 2008, Dr. Prostic rated claimant's permanent partial impairment at 10 percent to the body as a whole for his right

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

hip condition. Dr. Prostic's impairment rating with regard to the hip is based upon a labral tear. Dr. Prostic said that claimant had a positive physical test for a labral injury. The MRI done on July 7, 2008, was done with contrast and showed a mild superior chondral labral degeneration with a tiny shallow superior labral tear. Also, claimant has an impingement syndrome, and Dr. Prostic stated that if the impingement syndrome persists long enough, there will be a labral tear and eventually there probably will be delamination of the acetabular cartilage. Dr. Prostic said he did not use the *AMA Guides* in arriving at his rating for claimant's hip because the *Guides* do not address an impairment associated with a labral tear. The 10 percent rating for the hip is based upon his training and experience. Dr. Prostic did not apportion any part of the 10 percent rating to the hip towards the 2009 injury.

As a result of the third accident of April 28, 2009, Dr. Prostic rated claimant as being in DRE Lumbosacral Category III, for a 10 percent permanent partial impairment to the whole body. He said this rating encompassed the 5 percent claimant had from his October 2007 accident, and claimant has an additional 5 percent impairment for his low back from the April 2009 accident.

Dr. Alexander Bailey, a board certified orthopedic surgeon, began treating claimant on May 8, 2009. Claimant complained of pain in his mid to low back, right buttock, right hip, and down his right leg. When Dr. Bailey examined claimant, he presented with a slow gait and walked with crutches. He was non weight bearing on the right hip, and his back was tender to palpation. He had pain in the right flank down to his buttock and hip and was positive for pain in the right groin, right buttock, and hip joint. Internal and external range of motion caused pain. Dr. Bailey's initial diagnosis was low back strain, minor disk bulge in the lumbar spine, and possible hip fracture. Dr. Bailey reviewed the May 5, 2009, MRI of claimant's lumbar spine, which showed some mild right-sided S1 impingement.

Dr. Bailey's treatment plan for claimant was to work up his hip because everything on claimant's physical examination pointed to a hip abnormality. He ordered an MRI of the hip on May 28, 2009, the results of which were negative for a fracture dislocation, synovitis, or other kinds of symptoms of the hip. No muscle strain or tear was identified. Dr. Bailey did not find an abnormality in the right hip that he thought needed further treatment. Dr. Bailey was not aware an MRI of claimant's right hip with contrast was done on July 7, 2008, that showed a superior labral tear in claimant's right hip. The only MRI he had available was the one he ordered on May 28, 2009. Dr. Bailey agreed the July 7, 2008, MRI shows an abnormality and that it was possible that part of claimant's problems as related to 2008 could be emanating from his right hip.

In regard to claimant's back symptoms, Dr. Bailey recommended injections and physical therapy. Claimant did not report any relief from either treatment. EMG studies performed June 1, 2009, showed no evidence of lumbosacral plexopathy, myelopathy, or

peripheral neuropathy involving the lower extremities. There was no evidence of peripheral nerve entrapments. The results were indicative of a possible mild radiculitis but not actual lumbar radiculopathy. Dr. Bailey performed a lumbar diskography on August 17, 2009. The results of the diskogram were negative on all levels tested. Dr. Bailey said that with negative findings on claimant's hip and negative findings on his back, with a negative MRI and failure to identify a pain generator, Dr. Bailey felt there was little more he could do, and he released claimant from treatment on August 24, 2009. He did not give claimant any permanent restrictions but placed him at regular duty status.

Using the *AMA Guides*, Dr. Bailey found claimant to be in DRE Lumbosacral Category II and assigned him a 5 percent permanent partial impairment to the body as a whole for his low back complaints. In regard to claimant's right hip complaints, Dr. Bailey found no identifiable source of abnormality and concluded he had no impairment.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510e(a) states in part:

If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and

permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination.

K.S.A. 2009 Supp. 44-501(c) states "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

ANALYSIS

Claimant suffered three distinct accidents and three distinct injuries. These injuries were to his low back and right hip and involved some aggravations and overlapping of symptoms.

The first accident occurred on October 8, 2007. Claimant has a 5 percent permanent impairment of function from that injury. This impairment is arrived at by apportioning 5 percent of Dr. Prostic's final 10 percent DRE III rating, issued after all three accidents, to the first accident. The other 5 percent is attributable to the April 28, 2009

accident, which aggravated the claimant's preexisting condition and resulted in an additional 5 percent permanent impairment.

The second accident resulted in permanent injury to claimant's right hip, which the Board finds as a 5 percent permanent impairment of function to the body as a whole. Although Dr. Prostic rated claimant's right hip at 10 percent, he acknowledged that this rating was not per the AMA *Guides* because the *Guides* do not address the condition he diagnosed. Giving some weight to the contrary opinion of Dr. Bailey concerning the hip injury, the Board finds claimant's impairment from this injury to be 5 percent. The Board is not persuaded that claimant's hip injury has resolved because it remains symptomatic. Furthermore, the MRI performed in 2009 was done without contrast. As Dr. Prostic said, the MRI taken in 2008 was more reliable with respect to showing a labral tear because it was performed with contrast.

Following the first and the third accidents, claimant returned to work and earned at least 90 percent of his preinjury average weekly wage. Therefore, his permanent partial disability is limited to his percentage of impairment of function in all three claims. Claimant worked for a time in an accommodated position after his second accident that paid him less than 90 percent of his preinjury average weekly wage. However, claimant eventually returned to work earning a higher wage and is not seeking a work disability award (a permanent partial disability greater than the percentage of functional impairment) in any of these docketed claims.

CONCLUSION

In Docket No. 1,040,692, claimant has a 5 percent permanent partial general disability.

In Docket No. 1,040,693, claimant has a 5 percent permanent partial general disability.

In Docket No. 1,046,206, claimant has a 5 percent permanent partial general disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated February 15, 2010, is modified to find that claimant has a 5 percent permanent partial general disability in Docket No. 1,040,692; a 5 percent permanent partial general disability in Docket No. 1,040,693; and a 5 percent permanent partial general disability in Docket No. 1,046,206.

Docket No. 1,040,692

Claimant is entitled to 20.75 weeks of permanent partial disability compensation at the rate of \$510 per week or \$10,582.50 for a 5 percent functional disability, making a total award of \$10,582.50.

As of August 11, 2010, there would be due and owing to the claimant 20.75 weeks of permanent partial disability compensation at the rate of \$510 per week in the sum of \$10,582.50 for a total due and owing of \$10,582.50, which is ordered paid in one lump sum less amounts previously paid.

Docket No. 1,040,693

Claimant is entitled to 20.75 weeks of permanent partial disability compensation at the rate of \$510 per week or \$10,582.50 for a 5 percent functional disability, making a total award of \$10,582.50.

As of August 11, 2010, there would be due and owing to the claimant 20.75 weeks of permanent partial disability compensation at the rate of \$510 per week in the sum of \$10,582.50 for a total due and owing of \$10,582.50, which is ordered paid in one lump sum less amounts previously paid.

Docket No. 1,046,206

Claimant is entitled to 4 weeks of temporary total disability compensation at the rate of \$353.47 per week or \$1,413.88, followed by 20.75 weeks of permanent partial disability compensation at the rate of \$353.47 per week or \$7,334.50, for a 5 percent functional disability, making an award of \$8,748.38.

As of August 11, 2010, there would be due and owing to the claimant 4 weeks of temporary total disability compensation at the rate of \$353.47 per week in the sum of \$1,413.88, plus 20.75 weeks of permanent partial disability compensation at the rate of \$353.47 per week in the sum of \$7,334.50, less \$292.79, or 0.83 weeks of benefits at the \$353.47 rate, for the overpayment of temporary total disability compensation, for a total due and owing of \$8,455.59, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

ERODNEY PERRY

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**DOCKET NOS. 1,040,692; 1,040,693
and 1,046,206**

Dated this _____ day of August, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent
Kenneth J. Hursh, Administrative Law Judge